

attorney's misrepresentation, the client failed to file a timely *pro se* motion. *Wynn*, 292 F.3d at 228-29. This case is distinguishable from *Wynn* because the petitioner does not allege that his attorney deceived him about having filed a timely petition. As the magistrate judge points out, the facts of this case mirror those in *Ott v. Johnson*, 192 F.3d 510 (5th Cir. 1999), in which the Fifth Circuit held that the petitioner was not entitled to equitable tolling where counsel filed the state application one day before the expiration of the federal statute of limitations.

Petitioner also contends that the Fifth Circuit's holding in *Fisher v. Johnson*, 174 F.3d 710 (5th Cir. 1999), should extend to the "mental incapacity of the lawyer or the lawyer's staff leading to the late filing of a habeas petition." (Objections at 4, n.1.) In *Fisher*, the Fifth Circuit recognized that the mental incompetency of a prisoner might support equitable tolling, but held that a brief period of incapacity during a one-year statute of limitations does not necessarily warrant equitable tolling. *Fisher*, 174 F.3d at 715. Even assuming that the petitioner would be entitled to equitable tolling if his attorney or a staff member was incompetent, petitioner has not alleged any facts demonstrating that equitable tolling is warranted in this case. Petitioner failed to identify any mentally incapacitated individuals who were working on his petition, or explain how this might have caused him to file an untimely petition.

The court has conducted a *de novo* review of the objections in relation to the pleadings and the applicable law. *See* FED. R. CIV. P. 72(b). After careful consideration, the court concludes the objections are without merit.

ORDER

Accordingly, petitioner's objections are **OVERRULED**. The findings of fact and conclusions of law of the magistrate judge are correct and the report of the magistrate judge is

ADOPTED. A final judgment will be entered in this case in accordance with the magistrate judge's recommendation.

So **ORDERED** and **SIGNED** this **15** day of **March, 2006**.

A handwritten signature in black ink, appearing to read "Ron Clark", is positioned above a horizontal line.

Ron Clark, United States District Judge